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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85892404
Applicant	Internet Promise Group LLC
Applied for Mark	EAR NATURAL
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: INTERNET PROMISE GROUP®, LLC

Applicant

Mark: EAR NATURAL
Application Ser. No.: 85/892,404
Filed: 04/01/2013

APPEAL BRIEF

Honorable Commissioner of Trademarks
P O Box 1451
Alexandria, VA 22313-1451.

After the Final Rejection dated 1/31/2014, by the Examining Attorney of the applicant's mark, a Notice of Appeal was filed on 7/23/2014. Applicant files the attached Appeal Brief. The Appeal Brief is timely filed within 60 days of the Notice of Appeal dated 07/23/2014 that is on or before 9/23/2014.

Respectfully submitted,

Date: September 17, 2014

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INTRODUCTION

The mark is EAR NATURAL and the amended identification of the goods/services is:

A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections.

The issues on Appeal are:

- (i) Whether this mark is “Merely Descriptive” under Section 2(e) (1).
- (ii) Whether the identification of the goods is unacceptable.

Addressing the issue, whether this mark is Merely Descriptive under Section

2(e) (1) as the Examiner states in the Final Rejection:

Registration has been refused because the applied-for mark merely describes a feature/ingredient/characteristic/purpose of applicant's goods. The applicant has responded that the mark is not descriptive. Applicant's response has been considered and found unpersuasive for the reasons set forth below:

In this case, applicant seeks registration of the wording EAR NATURAL for a packaging with a dropper that contains limited quantity of mustard oil drops in the ear canal, for cure of middle ear infection, without use of antibiotics.

However, in the context of goods, the wording is merely descriptive. Here the identification of goods shows that in the context of the goods, the wording EAR is descriptive of the goods in that it specifies the purpose/use of the goods.

Moreover, the previously provided evidence shows that NATURAL is similarly descriptive because it immediately tells consumers that the goods are non-medicated and free of artificial ingredients.

Furthermore, the attached additional evidence and third party registrations further confirm that in relation to the specific goods, the wording immediately conveys a natural remedy for the treatment of ear ailments.

For the reasons as above, the refusal under Trademark Act 29e) (1) is now Final.

The second issue is whether the identification of the goods is unacceptable.

Examiner finds amended identification of the goods as unacceptable, as here the goods are not a packaging or droppers but mustard oil ear drops. As such, the language should clarify the goods and the applicant's response remains unacceptable.

ARGUMENTS ON APPEAL

The **first issue** is whether this mark is “Merely Descriptive” under Section 2(e) (1) as the Examiner states in the Final Rejection.

Identification of goods is:

A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections.

TMEP Section 1209 Refusal on Basis of Descriptiveness based on cited case law, the descriptiveness of the marks are defined on a continuum starting from (i) arbitrary, (ii) fanciful, (iii) suggestive, (iv) suggestive-incongruent (v) merely descriptive, and (iv) generic, where arbitrary and generic are on the two ends of the spectrum. Each of these identifications on the continuum has been defined with the help of case law.

Further, **TMEP** based on case law states that the degree of distinctiveness on this continuum can be determined only by considering the mark in relation to the specific goods or services. Applicant submits this determination is judged and determined on an objective person standard based on applicable case law and not determined on using a subjective standard.

TMEP also states that first four on this continuum (i) arbitrary, (ii) fanciful, (iii) suggestive, and (iv) suggestive-incongruent may be registered while generic marks are banned from registration. The marks that are merely descriptive may be registered if they have acquired distinctiveness.

Applicant submits that the mark EAR NATURAL based on the identification of the good/services fits in the continuum in “suggestive” identification and not “merely descriptive”.

Applicant in addition and or in the alternative submits that the mark EAR NATURAL based on the identification of the good/services fits in the continuum in “suggestive-incongruent” identification and not “merely descriptive”.

Applicant submits that the applied for mark EAR NATURAL in relation to the identification of the good is suggestive and not merely descriptive as Examiner has averred. The mark falls in the category of incongruent marks, a category of suggestive marks.

Based on applicable case law, applicable to suggestive marks, suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services.

The mark EAR NATURAL fits this definition of suggestive marks as the mark when applied to goods, require imagination, though or perception to reach a conclusion as to the nature of the goods or services.

Applicant submits even with any degree of thought and imagination, the mark EAR NATURAL does not enable an objective person to reach a conclusion as to the nature of the goods or services, that the goods are for the treatment of middle-ear infection and also does not enable an objective person to reach a conclusion that the mark relates to a natural remedy, when the mark is applied to goods.

For an objective person, the applied for mark does not lead to conclusion that the good relate to cure of middle-ear infection and also does not lead to a conclusion that use of mustard oil as a natural remedy. Thus the applied for mark EAR NATURAL, requires imagination, though or perception to reach a conclusion as to the nature of the goods or services.

The word EAR does not relate to any use of the ear and word NATURAL does not relate to any use of the product either of using mustard oil. Thus the mark requires imagination, thought or perception to reach a conclusion as to the nature of the goods or services.

As used in the common English, the word ear refers to outer ear and does not refer to middle-ear. The outer ear is part of the hearing organ that is visible on sides of the human head. Middle ear refers to bones and cartilages positioned at the far end of the ear canal that vibrate with the pressure waves of sound being received at the ear. Inner ear refers to the cochlea that is inside the brain and carries the vibrations from the middle ear to the inner ear.

Examiner equates the word EAR in the applied for mark to phrase “middle-ear” in the identification of the goods to support her arguments of “merely descriptive”, where middle-ear refers to internal organs of the ear related to hearing.

With due respect, the words ear and middle-ear are two entirely different words or terms, whereas EAR refers to the body part that is visible on the sides of the head and the word “middle-ear-infection” refers to a medical condition related to internal organs of the human ear referred to as middle-ear.

The purpose/use of the goods is to cure middle ear infections. The word EAR does not necessarily specify this purpose/use. As it relates to EAR, the purpose/use could be anything such as to clean the outer ear or the ear canal, for example, which is vastly different from the purpose/use of the goods for the applied for mark. Hence the word EAR does not describe the purpose/use of the goods.

Further. Examiner equates NATURAL used in the applied for mark to mustard oil in the identification of the goods. With due respect, NATURAL in the applied for mark does not refer to a quality or characteristic of the goods because,

there is nothing in the identification: “A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections”, that would enable an objective person to reach a conclusion as to the nature of the goods, based on use of the word natural as defined in the English language dictionary.

The identification of the goods is for a medical device for a specific medical purpose that of treating middle-ear infections and thus is far removed from any implication that the applied for mark EAR NATURAL would lead an objective person as to the nature of the goods.

Examiner has averred that as previously provided evidence shows that NATURAL is similarly descriptive because it immediately tells consumers that the goods are non-medicated and free of artificial ingredients. With due respect, based on amended identification of goods/services, it does not immediately tell consumers this because natural could mean many different things.

The word natural is widely used in the English language and as such has a large number of different meanings and or abstract meanings, such as natural

thought, and as a figure of speech, as naturally speaking. The applied for mark EAR NATURAL does not provide that context as to which meaning of word natural would be applicable.

Thus, a suggestive term differs from a descriptive term, which immediately tells something about the goods or services. *See In re George Weston Ltd.*, 228 USPQ 57 (TTAB 1985) (SPEEDI BAKE for frozen dough found to fall within the category of suggestive marks because it only vaguely suggests a desirable characteristic of frozen dough, namely, that it quickly and easily may be baked into bread).

Under the applicable case law, Applicant submits for the reasons as above, the applied for mark EAR NATURAL does not immediately tells something about the good or services and hence the applied for mark is at best suggestive and not merely descriptive.

The mark at issue in *In re George Weston Ltd* was SPEEDI BAKE, which was held to be suggestive mark because it only vaguely suggests a desirable characteristic of frozen dough.

Under the applicable case law, the applied for mark EAR NATURAL only similarly vaguely suggests that it may have something to do with human EAR and requires thought and mental perception of what it has to do with EAR. Therefore, the mark EAR NATURAL does not immediately tells something about the goods and thus is not merely descriptive.

In re The Noble Co., 225 USPQ 749 (TTAB 1985) (NOBURST for liquid antifreeze and rust inhibitor for hot-water-heating systems found to suggest a desired result of using the product rather than immediately informing the purchasing public of a characteristic, feature, function, or attribute);

Under the applicable case law, likewise, for the applied for mark EAR NATURAL, the mark does not immediately inform the purchasing public of a characteristic, feature, function or attribute of the goods that of curing middle ear infection.

In re Pennwalt Corp., 173 USPQ 317 (TTAB 1972) (DRI-FOOT held suggestive of anti-perspirant deodorant for feet in part because, in the singular, it is not the usual or normal manner in which the purpose of an anti-perspirant and deodorant for the feet would be described).

Under the applicable case law, likewise, for the applied for mark EAR NATURAL, the mark does not immediately inform the purchasing public of a characteristic, feature, function or attribute of the goods that of curing middle ear infection because these terms of the mark would not be chosen to describe the purpose of curing middle ear infection.

The Board has described incongruity in a mark as “one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark,” and has noted that the concept of mere descriptiveness “should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’” *In re Shutts*, 217 USPQ 363, 364–5 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow-removal hand tool).

Under the applicable case law, likewise, the applied for mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with

word NATURAL. Hence the applied for mark EAR NATURAL is an hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive.

Incongruity is a strong indication that a mark is suggestive rather than merely descriptive. *In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978) (TENNIS IN THE ROUND held not merely descriptive for providing tennis facilities, the Board finding that the association of applicant's marks with the phrase “theater-in-the-round” created an incongruity because applicant's tennis facilities are not at all analogous to those used in a “theater-in-the-round”).

Under the applicable case law, likewise, the mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with word NATURAL. Hence the applied for mark EAR NATURAL is hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some

measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive.

In re Vienna Sausage Mfg. Co., 156 USPQ 155, 156 (TTAB 1967)

(FRANKWURST held not merely descriptive for wieners, the Board finding that although “frank” may be synonymous with “wiener,” and “wurst” is synonymous with “sausage,” the combination of the terms is incongruous and results in a mark that is no more than suggestive of the nature of the goods).

Under the applicable case law, likewise, the applied for mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with word NATURAL. Hence the applied for mark EAR NATURAL is hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive.

In re John H. Breck, Inc., 150 USPQ 397, 398 (TTAB 1966) (TINT TONE held suggestive for hair coloring, the Board finding that the words overlap in significance and their combination is somewhat incongruous or redundant and does not immediately convey the nature of the product).

Under the applicable case law, likewise, the applied for mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with word NATURAL. Hence the applied for mark EAR NATURAL is hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive.

In re Getz Found., 227 USPQ 571, 572 (TTAB 1985) (MOUSE HOUSE held fanciful for museum services featuring mice figurines made up to appear as human beings, the Board finding that the only conceivable meaning of “mouse house,” i.e., a building at a zoo in which live and/or stuffed mice are displayed, is incongruous).

Under the applicable case law, likewise, the applied for mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with word NATURAL. Hence the applied for mark EAR NATURAL is hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive.

Suggestive marks, like fanciful and arbitrary marks, are registrable on the Principal Register without proof of secondary meaning. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004). Therefore, a designation does not have to be devoid of all meaning in relation to the goods/services to be registrable.

TMEP states: If, after conducting independent research, it is unclear to the examining attorney whether a term in a mark has meaning in the relevant industry, the examining attorney must make an inquiry of the applicant, pursuant to 37 C.F.R. §2.61(b).

If the examining attorney determines that the term is arbitrary or fanciful, the examining attorney may enter a Note to the File in the record indicating that research was conducted regarding the meaning of the term in the relevant industry, without stating any legal opinions or conclusions.

Applicant respectfully submits that no such independent research supports that mark has any meaning in the relevant industry related to treating middle ear infections.

The definitions for EAR and NATURAL as has been cited by the examiner have nothing to do with the identification of the goods of a medical device and the identification of the goods has nothing to do with either natural or ear per se. The mark therefore is suggestive and not merely descriptive.

The identification of the goods refers to something entirely different that has nothing to do with either EAR or NATURAL; and thus a combination of these words EAR and NATURAL is incongruent.

Applicant respectfully submits that the mark is not merely descriptive but suggestive for the following reasons. First, the words EAR and NATURAL are

incongruous terms as these two terms are not used in combination, the applied for mark EAR NATURAL is an incongruent mark and thus a suggestive mark as the terms of the mark EAR and NATURAL are incongruent and are not used together in this combination in the English Language, as a human EAR has nothing to do with word NATURAL. Hence the applied for mark EAR NATURAL is hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’ Thus the mark is incongruent and thus suggestive and not merely descriptive. Second the mark does not convey an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant’s goods and/or services.

Based on the applicable law and regulations above, Applicant argues the applicant’s mark for the identified good/services is suggestive and the mark is also incongruent and thus also suggestive.

The identification of goods defines the goods in question as: A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections.

With due respect, with these identification of the goods, the mark cannot be construed as “merely descriptive as the mark does not convey an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant’s goods and/or services and therefore is not merely descriptive.

Therefore Applicant respectfully submits that based on the foregoing analysis, the mark is not “merely descriptive” as the mark does not satisfy the legal standard of “merely descriptive”.

The second issue is whether the identification of the goods is unacceptable as the Examiner states in the Final Rejection.

Examiner finds amended identification of the goods as unacceptable, as here the goods are not a packaging or droppers but mustard oil ear drops. As such, the language should clarify the goods and the applicant’s response remains unacceptable.

Identification of goods is:

A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections.

The identification of the goods is for a medical device for a specific medical purpose that of treating middle-ear infections. The identification of goods is not for dropper or mustard oil or mustard oil drops. The identification is clear as it identifies the medical device and the purpose and manner of use of that medical device.

For the reasons as stated above, the identification of the goods is for a medical device for a specific medical purpose that of treating middle-ear infections. And the identification of the goods makes that clear. Hence the identification of the good is considered acceptable as it clearly identifies the identification of the goods to others.

Signed/Date: 09/17/2014

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